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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DEVON OMAR EPPS,

Defendant and Appellant.

C073140

(Super. Ct. No. SF119095A)

Defendant Devon Omar Epps savagely beat and stabbed Veronica J. and impaled her with a mop handle.<sup>1</sup> Veronica's badly decomposed body was discovered in defendant's apartment months after she was killed. A jury convicted defendant of first degree murder and infliction of corporal injury on a cohabitant, and found true the special-circumstance allegations that defendant committed murder while engaged in rape by instrument and that defendant intentionally killed Veronica and the killing involved torture. The trial court sentenced defendant to life without the possibility of parole.

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<sup>1</sup> We refer to certain individuals by their first names for clarity.

Defendant now contends the trial court erred in excluding third party culpability evidence. He also challenges the sufficiency of the evidence supporting the jury's finding of deliberation and premeditation, torture murder, and the special circumstances of murder by torture and murder while engaged in the commission of rape by instrument.

We conclude the trial court did not abuse its discretion in excluding the proffered third party culpability evidence because no direct or circumstantial evidence linked the third person to Veronica's murder. Viewing the entire record in the light most favorable to the judgment, we conclude substantial evidence supports the jury's first degree murder verdict and special-circumstance findings. We will affirm the judgment.

### BACKGROUND

Veronica lived with defendant. Her family reported her missing on June 27, 2011.<sup>2</sup>

Veronica's brother David recalled seeing Veronica and defendant at a park on June 25. David heard Veronica yell at defendant. Veronica wanted to buy a friend a sandwich, and defendant wanted to do something else. According to David, defendant was telling Veronica what to do and Veronica did not like it. She appeared upset. She left defendant and went with her friend. Veronica failed to attend a family birthday party on June 25.

Veronica's brother Isaac posted missing person flyers around town and at places where Veronica hung out. Isaac's wife called defendant's cell phone in late June or early July to ask whether defendant had seen Veronica. Defendant claimed he had not seen her.

Defendant's sister Tameka H. did not see Veronica in August and October, when she visited defendant outside his apartment building. Defendant did not mention

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<sup>2</sup> All dates refer to 2011 unless otherwise noted.

Veronica on those occasions. When Tameka went to defendant's apartment building to pick him up for Thanksgiving dinner on November 25, Tameka asked about Veronica. Defendant said Veronica was gone.

In an effort to effectuate an eviction, Eric H., the assistant manager of defendant's apartment building, prevented defendant from entering his apartment on December 4. Defendant insisted Veronica was in the bathroom and needed help. Defendant said "they" beat both defendant and Veronica, and Veronica was "beat real bad" and "her head was busted open." Defendant said Veronica had been in the bathroom for "[m]onths, days, weeks." He said Veronica could not eat because she did not have a face. He said someone set him up and jumped him. Tameka believed defendant needed psychiatric help and she called the police.

A badly decomposed body was discovered in defendant's third floor apartment the next day. The body was later identified as Veronica through dental records.

There was a knife by the front door of defendant's apartment but no blood was found on the knife. A mop head, with the handle broken off, was located near the bedroom. The floor and walls of the apartment were damaged. There were open cans of food in the kitchen and insects in the kitchen and bathroom.

Veronica was lying on her back, on the bathroom floor, adjacent to the bathtub. Her feet were towards the bathroom door and her head was dismembered. There was damage to the bathroom wall. Pieces of the drywall were found on Veronica's body and embedded in her decomposed skull. One side of her head showed extensive trauma. Her legs were spread open and her knees were slightly bent. She was wearing a red top which was pulled up under what appeared to be her chin, exposing her chest and stomach areas. Her pants and underwear were pulled down. Her body was laying on clothing and a partially torn Bible. Clothing was found on top of her body, which was infested with insects and pupae. Another part of the torn Bible was on top of her body.

There was an odor of bleach in the bathroom. A metal table pedestal, an empty bottle of peroxide, two cans of air freshener, a can of Raid, and an empty flytrap container, along with other things, were found in the bathtub. The base of the metal table pedestal was partially bent and deformed. Hair fiber was found on a corner of the pedestal. There were two small blood stains on the pedestal.

Pathologist Bennet Omalu opined the cause of death was blunt force trauma to the head and face, and stab wounds to the trunk and neck and impalement of the body through the vagina contributed to Veronica's death. Dr. Omalu opined Veronica had been dead for three to six months (closer to six months). He could not opine about the sequence in which the various wounds she suffered were inflicted.

Dr. Omalu opined the injuries to Veronica's head were consistent with someone repeatedly hitting her head against the wall and repeatedly hitting her with something like the table pedestal found in the bathtub. Dr. Omalu opined Veronica received more than five and possibly more than 20 blows to the head. There were fractures on the top and sides of Veronica's head, at the base of her skull, and on the front of her face caused by "high energy" impact. The bones on the right side of her face and head were broken into small pieces and collapsed into her skull. The bones at the base of her skull were fractured and broken into small pieces. Her neck was fractured. Dr. Omalu opined that the damage to a ring found on Veronica's left hand showed she took a defensive position when she was attacked. Two fingernails and fractured pieces of bone from her wrist were found in Veronica's skull, also indicating she tried to protect her head.

The bone of her upper jaw was fractured. Her lower jaw was broken into two parts. Veronica was still alive when she received the blunt force injuries to her head.

Dr. Omalu identified 32 deep stab wounds. There were stab wounds to Veronica's neck, abdomen, shoulder, back, groin, and buttocks. The stab wounds were fatal, especially the one to her neck and one of the stab wounds to her upper trunk. Dr. Omalu opined Veronica was alive and moving when she was stabbed. Pieces of splintered wood

were embedded in a large gaping stab wound to her groin. Dr. Omalu could not conclude whether the knife recovered from defendant's apartment caused the stab wounds because of the advanced decomposition of the body.

A broken wood handle was sticking out of Veronica's vagina. The sharpened end of the handle was thrust through her vagina, causing extensive lacerations in her vagina, pelvic cavity, abdomen, liver, and diaphragm. The handle came out the side of her neck. Veronica was still alive when she was impaled.

The pieces of splintered wood found in the stab wound to Veronica's groin matched the wood handle that impaled her. Dr. Omalu opined Veronica was stabbed with the mop handle and then impaled. He opined the mop head recovered from defendant's apartment was part of the broken wood handle recovered from Veronica's body.

Criminalist Jennai Lawson tested two areas of discoloration on the bathroom wall and determined the discolorations were not blood. Defendant's expert agreed, from his review of crime scene photographs and notes, there were no blood splatters like what he would expect to see in a bludgeoning or stabbing case. No semen was detected in the vaginal and rectal swabs obtained from Veronica's body.

No usable fingerprint impressions were found on the table pedestal. The People's DNA expert testified no conclusion could be reached about the identity of the person or persons associated with the blood stains on the table pedestal. Defendant's DNA expert, on the other hand, opined defendant was a possible contributor to the DNA from those blood stains and Veronica was excluded as a possible contributor. Defendant's expert further opined Veronica and defendant were excluded as contributors to DNA obtained from additional swabs taken from the table pedestal, and there was DNA from an unknown contributor present.

Defendant's expert testified a mixture of DNA was found from a swab obtained from the mop recovered from defendant's apartment. He opined defendant was a

possible contributor to that DNA, and Veronica was excluded as a possible contributor. Defendant's expert concluded the DNA of at least two unknown persons was also present on the mop.

Defendant's expert opined Veronica and defendant could not have contributed the DNA obtained from the top of the wood handle retrieved from Veronica's body. The People's expert disagreed with the interpretation of the data by the defendant's expert. The People's expert opined, based on her analysis of the data defendant's expert provided, the laboratory for defendant's expert had quality control problems. Defendant's expert admitted during cross-examination that his laboratory was not accredited at the time of the trial.

A T-shirt found in defendant's apartment contained blood stains. The experts testified about five areas on the shirt that were tested for DNA. The experts agreed two blood stains located on the back of the shirt contained DNA consistent with Veronica. Defendant was eliminated as a source of those blood stains. A blood stain from the front of the shirt contained a mixture DNA from at least two individuals. The People's expert said the partial major profile for that DNA was consistent with Veronica, and defendant could not be eliminated as a minor contributor of that DNA mixture. Defendant's expert agreed Veronica and defendant were possible contributors to the DNA from the front of the shirt. But defendant's expert opined defendant's DNA may be "from the background on the shirt," and defendant was not a "blood source" for that sample.

The People's expert opined defendant could not be eliminated as a major contributor to DNA from an unstained area on the front of the shirt. Defendant's expert opined defendant and an unknown individual were possible contributors to that DNA.

Trace swabs obtained from the collar and armpit areas of the shirt contained a mixture of DNA from three people. The People's expert opined the DNA mixture was too complex to interpret and did not reach a conclusion about the source of that DNA.

Defendant's expert opined Veronica, defendant, and an unknown individual were possible contributors to the DNA from the trace swabs.

Police found a jacket on the fire escape outside defendant's apartment. There was a wallet containing, among other things, defendant's California identification card and credit cards in Veronica's name inside the jacket. The wallet also contained receipts dated November 15 and 28 for money and groceries, bus passes, and business cards for a taxi service, a hotel, the police, and mental health services.

Tameka told police defendant said "[t]he girl's people" set him up. Defendant also said "Kirby" set him up. Kirby was defendant's childhood friend who moved away. Defendant began having auditory hallucinations involving Kirby when defendant was a teenager. According to Tameka, defendant had schizophrenia. She said defendant had good days and bad days.

Police arrested defendant on December 6. Defendant did not appear to have trouble understanding the arresting officer's commands and complied with those commands. Defendant gave the police a statement after being advised of his *Miranda*<sup>3</sup> rights. He acknowledged the body found in his apartment was Veronica; he said Veronica lived with him and he loved her. He said Veronica was seeing other men and he "became upset over that." He also said, "It upset me because she wanted to go down the wrong road." Defendant said Kirby killed Veronica and set defendant up.

The People and defendant presented witnesses who testified about screaming heard from defendant's apartment. Eric, the assistant manager, heard a female voice loudly pleading "help" and "stop" and screaming in defendant's apartment. He heard defendant loudly screaming "Shut up." Eric went to defendant's apartment, banged on the door, and said, "You guys got to knock it off. I have no problem calling the police."

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<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]

The noises stopped, but subsequently resumed. Eric pounded on defendant's door again and the sounds stopped. He did not hear female screaming coming from inside defendant's apartment after that time, and he did not see Veronica at the apartment building again. But sometime thereafter, Eric heard defendant angrily yelling, "Now, you bitch. Now what do you got to say, bitch? Now how do you feel? Didn't I tell you? Didn't I tell you this would happen? Now, bitch." Eric did not hear another voice answer defendant.

William M. lived on the same floor as defendant. He heard defendant say things like, "I'll fuck you up. Keep it up, bitch. I said shut the hell up." He also heard defendant say "Shut the fuck up, I'll shut you up, I ain't playing." This occurred in the month of May, June, or July. William thought defendant was talking on a cell phone because William did not hear a response to defendant's statements. In addition, William heard someone pounding on the wall and floor in defendant's apartment.

Leslie P. was the on-site manager for defendant's apartment building. She heard defendant screaming, hollering, or banging stuff around in his apartment about once a week. Defendant would not respond when Leslie went to his apartment door. Leslie never heard a woman screaming from defendant's apartment, but she heard women screaming from the apartment below defendant's apartment.

The People prosecuted defendant for first degree murder under two theories: willful, deliberate, and premeditated murder and murder by torture. The jury convicted defendant of first degree murder (count one -- Pen. Code, § 187)<sup>4</sup> and infliction of corporal injury on a cohabitant (count two -- § 273.5). In addition, the jury found true the special-circumstance allegations that defendant committed murder while engaged in rape by instrument (§ 190.2, subd. (a)(17)(K)) and murder by torture (§ 190.2, subd. (a)(18))

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<sup>4</sup> Undesignated statutory references are to the Penal Code.



and the allegation that defendant personally used a weapon (§ 12022, subd. (b)(1)). Following the sanity phase of the trial, the jury found defendant was legally sane at the time he committed the charged offenses.

The trial court sentenced defendant to life without the possibility of parole on count one and imposed but stayed sentence on the count two conviction and the section 12022, subdivision (b)(1) finding.

## DISCUSSION

### I

Defendant contends the trial court erred in excluding third party culpability evidence.

### A

Defendant moved to admit evidence that Christopher S., the man who lived in the apartment below defendant's apartment, killed Veronica. Defendant offered to prove the following facts which he claimed incriminate Christopher: the table pedestal, mop handle, and bloody shirt contained DNA belonging to an unknown third person; Christopher spent a great deal of time in defendant's apartment; Veronica spent time with Christopher;<sup>5</sup> she did laundry with Christopher once;<sup>6</sup> Christopher was with Veronica the last time Leslie saw Veronica, which was in the late spring or early summer; Christopher had a history for violence, such as convictions for making terrorist threats and trespassing, arrests for battery and indecent exposure, and a domestic violence restraining order against him; Leslie heard women yell for help from inside Christopher's apartment

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<sup>5</sup> Leslie, the apartment manager, told police she saw Veronica in the company of other residents of the apartment building.

<sup>6</sup> By the time the trial court decided defendant's motion, there was testimony that clothing was found under Veronica's body. Defendant characterized that clothing as laundry. Defense counsel argued Christopher could have killed Veronica after they did laundry together.

and called the police on several occasions because Christopher had locked women (but not Veronica) in his apartment; Christopher made statements that could be interpreted as incriminating before his interview with police, such as muttering, “Fuck no, I ain’t going to let them take me to jail,” “Can’t charge me with murder, I can beat it,” and “I was the closest one to her,” and he said something about catching the Greyhound and train to Oakland; Christopher told police defendant wanted Christopher to have sex with Veronica because defendant and Veronica liked Christopher and Christopher did not have a girlfriend, but Christopher did not have sex with Veronica; Christopher refused to take a lie detector test; and after speaking with police detectives Christopher asked, “is that enough to convict [defendant]?”

The trial court reviewed the video recording of Christopher’s interview with police. In that interview, Christopher also said he confronted defendant when he saw a photograph of Veronica on a missing person’s list about six months prior to his December 6 police interview. Yelling through defendant’s apartment door, Christopher asked where Veronica was. He told defendant Veronica was just doing laundry with Christopher. But defendant did not open his apartment door. Christopher said he never saw or smelled a dead body in defendant’s apartment, even though he was in the apartment several times. Defendant always kept his bathroom door shut and Christopher did not recall using defendant’s bathroom.

The trial court denied defendant’s motion, concluding that evidence relating to Christopher was not capable of raising a reasonable doubt about defendant’s guilt, and the evidence was inadmissible under Evidence Code section 352.<sup>7</sup>

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<sup>7</sup> Evidence Code section 352 provides, “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

## B

In assessing an offer of proof relating to third party culpability evidence, the trial court must decide whether the evidence could raise a reasonable doubt as to the defendant's guilt and whether the evidence is substantially more prejudicial than probative under Evidence Code section 352. (*People v. Elliott* (2012) 53 Cal.4th 535, 580 (*Elliott*)). The trial court is not required to admit evidence, no matter how remote, to show a third party's possible culpability for the charged offense. (*People v. Panah* (2005) 35 Cal.4th 395, 481 (*Panah*)). “ ‘[T]o be admissible, evidence of the culpability of a third party . . . must link the third person either directly or circumstantially to the actual perpetration of the crime.’ ” (*Elliott, supra*, 53 Cal.4th at p. 580.) “[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt.” (*People v. Hall* (1986) 41 Cal.3d 826, 833 (*Hall*)). We review a trial court's ruling excluding third party culpability evidence for abuse of discretion. (*Elliott, supra*, 53 Cal.4th at p. 581.)

The trial court did not abuse its discretion in excluding the third party culpability evidence defendant proffered because no direct or circumstantial evidence linked Christopher to Veronica's murder. (*People v. Brady* (2010) 50 Cal.4th 547, 558 (*Brady*) [to be relevant, proffered evidence must link the third person to the actual commission of the crime]; *People v. DePriest* (2007) 42 Cal.4th 1, 43 (*DePriest*)). There is evidence Christopher visited defendant's apartment, was seen with Veronica, and did laundry with her once. Defendant argues Christopher had a possible motive to kill Veronica, namely he was sexually interested in her.<sup>8</sup> But a possible motive and opportunity to commit the crime, without more, are insufficient to raise a reasonable doubt about defendant's guilt. (*Panah, supra*, 35 Cal.4th at p. 481 [presence of unknown men in the apartment complex

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<sup>8</sup> We agree with the Attorney General that Christopher's statement to police does not suggest Christopher had a sexual interest in Veronica.

where the victim disappeared, absent evidence linking them to the crime, does not qualify as admissible third party culpability evidence]; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1175.)

Defendant says the proffered evidence showed a nexus between Christopher and Veronica. What is required under *Hall, supra*, 41 Cal.3d 826 is a link between Christopher and the actual perpetration of Veronica's killing. (*Elliott, supra*, 53 Cal.4th at p. 580; *Hall, supra*, 41 Cal.3d at p. 833.) Such link is not present here.

There is no evidence connecting Christopher to the bathroom where Veronica's body was discovered. No DNA evidence connected Christopher to the table pedestal, mop handle, bloody shirt, or Veronica's body. There is no evidence that Christopher was the last person in Veronica's company before she was killed or that Christopher was present when she was killed. (*People v. Adams* (2004) 115 Cal.App.4th 243, 253 [considering whether third party was present at the murder scene and whether third party was with the victim on the date of her death in finding no abuse of discretion in excluding proffered third party culpability evidence].)

Defendant did not argue in the trial court that evidence of Christopher's prior misconduct is admissible under Evidence Code section 1101. In general, prior conduct evidence is inadmissible to establish a person's criminal propensity. (Evid. Code, § 1101; *People v. McWhorter* (2009) 47 Cal.4th 318, 372 [Evidence Code section 1101 applies to proposed third party culpability evidence].) Moreover, evidence offered to show a third party is more likely the perpetrator because he has a history of violence does not amount to direct or circumstantial evidence linking the third person to the actual perpetration of the crime. (*McWhorter, supra*, 47 Cal.4th at pp. 372-373; *People v. Davis* (1995) 10 Cal.4th 463, 501.)

Defendant summarily states in his appellate opening brief that Christopher's prior misconduct "likely qualified as prior acts of sexual misconduct or domestic violence under Evidence Code section 1108 or 1109." Evidence Code section 1108 provides that

in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Evidence Code section 1101, if the evidence is not inadmissible under Evidence Code section 352. (Evid. Code, § 1108, subd. (a).) Evidence Code section 1109 provides that except in certain circumstances not applicable here, in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Evidence Code section 1101 if the evidence is not inadmissible under Evidence Code section 352. (Evid. Code § 1109, subd. (a).)

Defendant states in his appellate reply brief, again without analysis, that Christopher's "prior assaultive and false imprisonment behavior" is admissible under Evidence Code sections 1108 or 1109. Presumably defendant's statement relates to Leslie's report to police that Christopher locked women in his apartment and Leslie heard the women yelling from inside Christopher's apartment. But defendant does not explain how the information Leslie provided police is sufficient to show Christopher committed a "sexual offense" within the meaning of Evidence Code section 1108, subdivision (d)(1)<sup>9</sup> or an offense involving "domestic violence" within the meaning of Evidence Code

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<sup>9</sup> Evidence Code section 1108, subdivision (d)(1) defines "sexual offense" as "a crime under the law of a state or of the United States that involved any of the following: [¶] (A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code. [¶] (B) Any conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem. [¶] (C) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person. [¶] (D) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body. [¶] (E) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person. [¶] (F) An attempt or conspiracy to engage in conduct described in this paragraph."

section 1109, subdivision (d)(3).<sup>10</sup> Defendant's claim that Christopher's prior acts are admissible under Evidence Code sections 1108 and 1109 is forfeited by his failure to provide any supporting analysis. (*People v. Williams* (1997) 16 Cal.4th 153, 206; *People v. Medrano* (2008) 161 Cal.App.4th 1514, 1520.)

Defendant further claims exclusion of the third party culpability evidence violated his federal constitutional due process right to present a defense. The California Supreme Court has rejected similar claims. (*People v. Page* (2008) 44 Cal.4th 1, 36; *DePriest*, *supra*, 42 Cal.4th at p. 43; *People v. Prince* (2007) 40 Cal.4th 1179, 1242-1243.) "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. . . . [T]his principle applies perforce to evidence of third-party culpability." (*Hall*, *supra*, 41 Cal.3d at pp. 834-835.)

The trial court did not err in concluding the proffered evidence relating to Christopher is inadmissible because it did not link him to Veronica's murder. Having found the proffered evidence lacked relevance, we do not consider defendant's Evidence Code section 352 claims.

## II

Defendant argues the evidence of deliberation and premeditation is insufficient to support the jury's first degree murder verdict.

"In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we 'examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- evidence that is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the

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<sup>10</sup> " 'Domestic violence' means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship." (§ 13700, subd. (b); see Evid. Code, § 1109, subd. (d)(3).)

defendant guilty beyond a reasonable doubt.’ [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) And we accept logical inferences the jury might have drawn from the evidence, even if we would have concluded otherwise. (*Brady, supra*, 50 Cal.4th at p. 561.) We do not reevaluate the credibility of witnesses or resolve factual conflicts. (*Id.* at p. 564.) The standard of review is the same when the prosecution relies primarily on circumstantial evidence and for special-circumstance allegations. (*Id.* at p. 561; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200 (*Whisenhunt*).) Reversal on the ground of insufficiency of the evidence is not warranted unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the verdict. (*People v. Hughes* (2002) 27 Cal.4th 287, 370.) “ ‘[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.’ ” (*Guerra, supra*, 37 Cal.4th at p. 1129.)

“A murder that is willful, deliberate, and premeditated is murder in the first degree. (§ 189.) ‘ “ ‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance. [Citations.] ‘The process of premeditation . . . does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .” [Citations.]’ ” ’ [¶] ‘ “ ‘An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.’ ” ’ ” (*Brady, supra*, 50 Cal.4th at p. 561.)

Citing *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), defendant argues there is no evidence of motive, planning activity, and manner of killing which supports the jury’s finding that he killed Veronica with premeditation and deliberation.

In *Anderson*, the California Supreme Court developed a framework to help reviewing courts analyze claims challenging the sufficiency of the evidence supporting a finding of premeditation and deliberation. The Supreme Court identified three categories of evidence or factors pertinent to a determination of premeditation and deliberation: preexisting motive, planning activity, and manner of killing. (*Anderson, supra*, 70 Cal.2d at pp. 26-27.) Those factors “ ‘need not be present in any particular combination to find substantial evidence of premeditation and deliberation.’ ” (*Brady, supra*, 50 Cal.4th at p. 562.) The *Anderson* factors are not afforded special weight, nor are they exhaustive. (*Brady*, at p. 562.) In any event, there is evidence from which the jury could reasonably find all three *Anderson* factors.

Defendant’s statements to police suggest a motive for killing Veronica. Defendant said Veronica was seeing other men and he “became upset over that.” He also said, “It upset me because she wanted to go down the wrong road.” Veronica’s brother David said that on June 25, defendant was trying to tell Veronica what to do and Veronica did not like that. David said he thought Veronica did not want defendant around her. The jury could reasonably have found, from defendant’s statements and David’s testimony, that defendant was jealous of Veronica seeing other men and that, as the prosecutor argued, defendant wanted to control Veronica.

The evidence also permitted a rational trier of fact to find defendant reflected on his actions before he killed Veronica. Dr. Omalu opined Veronica died sometime between June and September, closer to June. Eric, the assistant manager of defendant’s apartment building, heard a female voice loudly pleading “help” and “stop” from inside defendant’s apartment and defendant screaming “shut up” “at least four months back from December.” The yelling stopped when Eric banged on defendant’s door, but the screaming resumed shortly thereafter, prompting Eric to bang on defendant’s door again before the screaming stopped altogether. In addition to hitting Veronica’s head against the wall, defendant used three implements to beat, stab, and impale her. Police recovered



a mop head outside the bathroom. Defendant used the handle that had been broken off from that mop head to stab and impale Veronica. The jury could have reasonably found that more than a fleeting moment passed during the attack against Veronica; defendant had an opportunity to and did reflect during that time; defendant armed himself with different implements in order to kill Veronica; and he brought the broken mop handle into the bathroom to stab and impale her. All of the above indicate planning activity. (*People v. Wharton* (1991) 53 Cal.3d 522, 547 [planning activity is evident where the defendant armed himself in advance of the killing or where he obtained a weapon after arguing with the victim and returned with the weapon to kill the victim]; *People v. Perrotta* (1964) 224 Cal.App.2d 498, 500, 504-505 [severe nature and number of wounds suffered by the victim -- skull fracture, contusions to the brain, very heavy blows to the abdomen, and lacerations on the arms and legs -- along with prior threats against the victim indicate deliberation and premeditation].) Premeditation and deliberation do not require evidence of extensive planning. (*Brady, supra*, 50 Cal.4th at p. 563.)

In addition, a rational trier of fact could also have found, based on the statements Eric and William heard defendant make in his apartment, that defendant killed Veronica as a result of preexisting reflection. Sometime after Eric heard a female voice pleading for help in defendant's apartment, Eric heard defendant angrily yelling, "Now, you bitch. Now what do you got to say, bitch? Now how do you feel? Didn't I tell you? Didn't I tell you this would happen?" William heard defendant say "I'll fuck you up. Keep it up, bitch. I said shut the hell up." Defendant's statements are consistent with a preexisting intent to harm Veronica, which intent he carried out when he brutally killed her.

Defendant says the fact that Veronica was killed in the apartment she shared with defendant, where the neighbors could hear what was said inside the apartment, shows a lack of planning. We disagree. Defendant controlled entry into his apartment. For example, he never let Eric into the apartment. Even though his neighbors and apartment managers heard yelling and screaming coming from his apartment, defendant was able to

kill Veronica without someone going in his apartment to investigate. The jury could have reasonably inferred from the evidence that defendant planned to kill Veronica in the apartment because no one would stop him there.

The brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation. (*Anderson, supra*, 70 Cal.2d at p. 24.) But when considered with the evidence of motive and planning activity, the manner of killing can support the inference that the defendant killed with deliberation and premeditation. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 658-659.) Here, the jury could reasonably find the multiple and serious injuries to Veronica's head, neck and jaw, the 32 stab wounds, and the impalement showed a calculated design to kill Veronica. (*People v. Elliot* (2005) 37 Cal.4th 453, 460, 471 [about 80 stab and slash wounds and four gunshot wounds to the head suggested a calculated design to kill]; *San Nicolas, supra*, 34 Cal.4th at pp. 658-659 [the jury could fairly find deliberation from the sheer number of wounds on the victim's body, many of which individually would have been fatal].) Impaling Veronica through her vagina is also consistent with the jealousy motive for the killing. The mere possibility that the jury could have found defendant acted out of an unconsidered explosion of violence does not warrant a reversal of the judgment. (*Brady, supra*, 50 Cal.4th at p. 565.)

Viewing the entire record in the light most favorable to the judgment, we conclude substantial evidence supports the jury's finding of premeditation and deliberation.

### III

Defendant also challenges the sufficiency of the evidence to support a jury finding of torture murder and the special circumstance of murder by torture.

Murder perpetrated by torture is murder in the first degree. (*People v. Edwards* (2013) 57 Cal.4th 658, 715.) The elements of murder by torture are "1) an act or acts causing death that involve a high degree of probability of death, 2) a causal relationship between the torturous act and death, 3) a willful, deliberate, and premeditated intent to

inflict extreme and prolonged pain on a person for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose, and 4) commission of the act or acts with such intent.” (*Id.* at pp. 715-716; see *Whisenhunt, supra*, 44 Cal.4th at p. 201 [torture murder requires the same proof of deliberation and premeditation as is required of other kinds of first degree murders].) The torturous act must occur before the victim dies. (*Edwards, supra*, 57 Cal.4th at p. 716.) The killer must intend “to ‘ ‘cause pain and suffering in addition to death,’ ” and ‘ ‘in the course, or as a result of inflicting pain and suffering, the victim dies.’ ” [Citation.] The ‘ ‘finding of murder-by-torture encompasses the totality of the brutal acts and the circumstances which led to the victim’s death. [Citation.] The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather it is the continuum of sadistic violence that constitutes the torture.’ ” [¶] ‘The jury may infer the intent to inflict extreme pain from the circumstances of the crime, the nature of the killing, and the condition of the body.’ [Citation.] A perpetrator need not have any intent to kill [citation], and it need not be proven that the victim actually suffered pain [citation].” (*Ibid.*; see *People v. Elliot, supra*, 37 Cal.4th at p. 469.)

The torture-murder special circumstance requires (1) an intentional killing, and (2) the infliction of torture, (3) with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose. (§ 190.2, subd. (a)(18); *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1187 (*Hajek*), overruled on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *Whisenhunt, supra*, 44 Cal.4th at p. 202.) As with torture murder, the intent to torture for the torture-murder special circumstance “ ‘is a state of mind which, unless established by the defendant’s own statements (or by another witness’s description of a defendant’s behavior in committing the offenses), must be proved by the circumstances surrounding the commission of the offense [citations], which include the nature and severity of the victim’s wounds.’ ” (*People v. Smith* (2015) 61 Cal.4th 18, 52.)

The totality of the facts in this case support torture murder and torture-murder special-circumstance findings. Blunt force trauma injuries to the head, face and neck caused Veronica's death. But in addition to those injuries, Veronica was repeatedly stabbed in the neck and torso. (*Hajek, supra*, 58 Cal.4th at p. 1188 [the intentional infliction of nonlethal wounds may demonstrate an intent to cause the victim to suffer pain in addition to the pain of death].) Further, the sharp end of the broken mop handle was thrust through Veronica's vagina with such force that it lacerated various organs in her torso and passed through her body until it came out the side of her neck. Veronica was still alive when she received the blunt force injuries, was stabbed, and was impaled. Each of the types of injuries she received would have caused Veronica high levels of pain. Additionally, the statements Eric and William heard defendant make in his apartment can reasonably be found to evince an intent to cause Veronica pain. (*Ortega v. Superior Court* (1982) 135 Cal.App.3d 244, 258 [the defendant's statement that he had agreed to "hurt" a girl indicates he intended to inflict pain upon the victim].)

A rational trier of fact could conclude from the circumstances of the killing, including the evidence of deliberation and premeditation we have described, that defendant intended to kill Veronica; he committed torturous acts upon her before she died, with the willful, deliberate, and premeditated intent to cause her extreme and prolonged pain, in addition to the pain of death, for the purpose of revenge or a sadistic purpose; and his torturous acts had a high degree of probability of death and did cause Veronica's death. (*Hajek, supra*, 58 Cal.4th at p. 1188 [the jury could reasonably infer from evidence of deliberate and gratuitous violence beyond that which was necessary to kill the victim that the defendant intended to cause the victim severe pain].)

Defendant says there is insufficient evidence to permit a finding of intent to torture because there is no evidence of a meticulous, systematic or methodical approach in the infliction of wounds upon Veronica or evidence of the "application of controlled force." But evidence of a meticulous, controlled approach is not the exclusive manner of proving

intent to torture. For example, in *Smith, supra*, 61 Cal.4th 18, the Supreme Court found sufficient evidence of intent to torture even though there was no evidence that any method the defendant employed was meticulous or had a “nearly scientific air.” (*Id.* at pp. 23-24, 52.) The defendant in *Smith* told the victim she was going to kill herself, forced her to cut her own wrist, repeatedly cut her wrist himself when he was unsatisfied with the cuts made by the victim, forced the victim to hold her wrists over a fire pit, hit her when she moved her wrists, poured whiskey over the cuts while she screamed, then tightly wrapped a plastic bag over her head and repeatedly struck her with a metal bar until a blow produced a snapping sound. (*Id.* at pp. 23-24.) There is no indication in the opinion that the cuts the defendant made to the victim’s wrist or the blows he administered were precise or controlled.

Substantial evidence supports a murder by torture conviction and the torture-murder special-circumstance finding.

#### IV

Defendant further argues there is insufficient evidence to support the special-circumstance finding that he killed Veronica while engaged in the commission of rape by instrument.

Section 190.2, subdivision (a)(17)(K) provides that the penalty for first degree murder committed while engaged in the commission of rape by instrument in violation of section 289 is death or imprisonment in the state prison for life without the possibility of parole. A defendant is guilty of rape by instrument when he (1) commits an act of sexual penetration using an instrument, and (2) the act is accomplished against the victim’s will, (3) by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. (§ 289, subd. (a)(1)(A); *People v. Adams* (1993) 19 Cal.App.4th 412, 428.) “Sexual penetration” includes the act of causing the penetration, however slight, of the genital opening of a person for the purpose of sexual arousal, gratification, or abuse by any instrument. (§ 289, subd. (k)(1).)

A felony-murder special circumstance, such as murder committed while the defendant was engaged in the commission of rape by instrument, applies when murder occurs during the commission of the felony, not when the felony occurs during the commission of a murder. (*People v. Andreasen* (2013) 214 Cal.App.4th 70, 81.) The felony-murder special circumstance requires a showing that the intent to commit the felony is independent of, or concurrent with, the intent to kill. (*People v. Mendoza* (2000) 24 Cal.4th 130, 183; *Andreasen, supra*, 214 Cal.App.4th at pp. 80-81.) The commission of the felony cannot be merely incidental to the murder. (*People v. Dement* (2011) 53 Cal.4th 1, 46-47 & fn. 25, overruled on other grounds in *People v. Rangel, supra*, 62 Cal.4th at p. 1216; *People v. Abilez* (2007) 41 Cal.4th 472, 511.) For example, in a case involving the arson-murder special circumstance, evidence that the defendant set a fire intending not only to kill the victim but also to destroy evidence that he had raped the victim supported the special-circumstance finding. (*Mendoza, supra*, 24 Cal.4th at pp. 182-184.) “If the defendant committed the felony for the sole purpose of effectuating the killing, the felony-murder special circumstance does not apply.” (*Andreasen, supra*, 214 Cal.App.4th at p. 81.)

Here, defendant concedes the evidence showed an act constituting rape by instrument, but he argues the evidence showed the rape by instrument was incidental to the murder. We disagree.

There was evidence from which a rational trier of fact could conclude that defendant intended to commit rape by instrument and defendant also intended to kill Veronica by stabbing and beating her. Defendant told police he wanted to have “more of a relationship” with Veronica, but Veronica saw other men. Defendant “became upset over that.” He was also upset because he thought Veronica “wanted to go down the wrong road.”

Veronica’s top was pushed up to her chin. Her pants and underwear were pulled down. Her legs were spread open. The positioning of Veronica’s clothing and legs and

the fact that defendant impaled her through her vagina, along with defendant's statements to police, indicate a purpose independent of killing her. The jury could infer defendant wanted to punish Veronica for her perceived misdeeds against him.

Veronica was still alive when defendant shoved the mop handle through her vagina, beat her and stabbed her. Dr. Omalu said the pain from the impalement, blunt force trauma and stab wounds would have lasted minutes. On this record, a rational trier of fact could conclude defendant had independent goals of sexually assaulting and killing Veronica, and the rape by instrument was not merely incident to the commission of the murder. We reject defendant's insufficiency of the evidence claim.

#### DISPOSITION

The judgment is affirmed.

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/S/  
MAURO, J.

We concur:

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/S/  
RAYE, P. J.

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/S/  
MURRAY, J.